Filed 5/3/10 A.S. v. Superior Court CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

A.S., Petitioner, v. THE SUPERIOR COURT OF MERCED COUNTY, Respondent; MERCED COUNTY HUMAN SERVICES AGENCY, Real Party in Interest.	F059483 (Super. Ct. No. JV27863) **O P I N I O N**

THE COURT*

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Harry L. Jacobs, Commissioner.

A.S., in pro. per., for Petitioner.

No appearance for Respondent.

James N. Fincher, County Counsel, and James B. Tarhalla, Deputy County Counsel, for Real Party in Interest.

*Before Wiseman, Acting P.J., Cornell, J., and Hill, J.

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Petitioner seeks an extraordinary writ (Cal. Rules of Court, rule 8.452) from respondent court's order issued at a contested 12-month review hearing setting a Welfare and Institutions Code section 366.26[1] hearing as to his daughter A. We will deny the petition.

STATEMENT OF THE CASE AND FACTS

In July 2008, then three-year-old A. was removed from petitioner's custody and placed in foster care by the Merced County Human Services Agency (agency) after petitioner was arrested for suspicion of committing lewd acts with a 13-year-old girl. This was not petitioner's first sexual offense. He was convicted in 1991 of a lewd and lascivious act on a child under the age of 14 pursuant to Penal Code section 288, subdivision (a) and ordered to register as a sex offender. At the time of A.'s removal, petitioner had sole custody of her. A.'s mother, Arielle,[2] was then and would continue to reside in the state of Washington.

The agency filed a dependency petition on A.'s behalf and asked petitioner and Arielle if they had Native American heritage. Arielle said she did not. Petitioner stated he was not a registered member but believed he had Native American heritage through the Blackfoot Indian Tribe.

The juvenile court ordered A. detained and set the jurisdictional/dispositional hearing for September 2008. The hearing was continued several times and conducted in November 2008. Meanwhile, the agency notified the Blackfeet Tribe[3] and the Bureau of

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

2 Arielle did not file a writ petition.

3 Though petitioner claimed Indian heritage through the "Blackfoot" Tribe, the agency notified the "Blackfeet" Tribe undoubtedly because the Blackfoot Tribe is not

Indian Affairs (BIA) in the Department of the Interior that A. might be an Indian child under the ICWA.[4] The agency also notified the BIA and relevant Cherokee Tribes after Arielle claimed Native American heritage through them. In October 2008, the agency received a letter from the Blackfeet Tribe that A. was not listed in the Blackfeet Tribal Enrollment Records and therefore not an "Indian Child" as defined by the ICWA.

In its report for the jurisdictional/dispositional hearing, the agency recommended the juvenile court provide reunification services for Arielle but deny petitioner services pursuant to section 361.5, subdivision (b)(12) because he was convicted of Penal Code section 288, subdivision (a), a violent felony as defined in Penal Code section 667.5.

Petitioner appeared in custody and represented by counsel at the jurisdictional/dispositional hearing in November 2008. The juvenile court adjudged A. a dependent of the court, ordered her removed from parental custody and ordered reunification services for Arielle. The court denied reunification services for petitioner as recommended by the agency and set the six-month review hearing for May 2009.

In its report for the six-month review hearing, the agency recommended the juvenile court continue reunification services for Arielle. In addition, the agency recommended the court find that the ICWA did not apply based on the negative responses of the Blackfeet and Cherokee Tribes.

The six-month review hearing was continued and conducted in June 2009. Meanwhile, petitioner was sentenced to 16 years in state prison.

At the six-month review hearing, the juvenile court continued reunification services for Arielle and set the 12-month review hearing for December 2009. The court

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a federally recognized tribe and thus not subject to the notice provisions of the Indian Child Welfare Act (ICWA). (74 Fed. Reg. 40219 (Aug. 11, 2009)).

[4] Title 25 United States Code section 1901 et seq.

also found the ICWA did not apply. Neither petitioner nor Arielle appealed from the juvenile court's ICWA finding.

The 12-month review hearing was continued and conducted as a contested hearing in February 2010. At the conclusion of the hearing, the juvenile court terminated Arielle's reunification services and set a section 366.26 hearing. This petition ensued.

DISCUSSION

Petitioner contends the juvenile court erred in finding that the ICWA did not apply. Real party in interest argues petitioner is foreclosed from challenging the court's ICWA finding by not raising it on appeal. We agree.

In dependency proceedings, all orders and findings subsequent to and inclusive of the dispositional order are reviewable by direct appeal with the exception of those issued at the hearing setting the section 366.26 hearing. (§§ 366.26, subd. (*l*) & 395; *Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 811-812 (*Steve J.*).) Failure to challenge an appealable dependency order and/or finding constitutes a waiver of appellate review. (*Steve J.*, *supra*, at pp. 811-812.) This includes a juvenile court's finding with respect to the ICWA. (*In re Pedro N.* (1995) 35 Cal.App.4th 183, 185.)

In this case, the juvenile court found the ICWA did not apply at the June 2009 six-month review hearing. The court's ICWA finding was, therefore, reviewable by direct appeal. However, petitioner did not appeal and the court's ICWA finding is final. Thus, the time to challenge the juvenile court's ICWA finding has passed and petitioner has waived appellate review. We find no error.

DISPOSITION

The petition for extraordinary writ is denied. This opinion is final forthwith as to this court.